



April 18, 2018

Submitted Electronically via NLRB.gov

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

Re: NLRB Request for Information Regarding Election Regulations

Dear Ms. Rothschild:

The Independent Bakers Association (“IBA”) appreciates the opportunity to offer information to the National Labor Relations Board (“NLRB”) in response to the request for information about the rules for processing representation case petitions implemented on April 14, 2015 (“Election Rules”). NLRB Rules and Regulations §§ 102.60-102.72. IBA is a Washington, D.C.-based national trade association of more than 250 mostly family-owned wholesale bakeries and allied businesses. The Association was founded in 1968 to protect the interests of independent wholesale bakers.

IBA members have taken an interest in the changes made by the Election Rules and their impact on the processing of representation case petitions by the NLRB. In response to the NLRB’s request for information, we have undertaken research to better understand the impact of the Election Rules on companies such as those that make up our membership.

Our research has revealed a general sentiment that the Election Rules should be rescinded, and the previously existing rules reinstated. The prior system offered a predictability and stability that follow decades of well-established practice and procedure. With the advent of the Election Rules, that predictability has been undermined by what we see as an attempt to force the process in the interests of speed over substance. A substantial sector of our membership consists of small, family owned companies that frequently lack the internal resources to comply with complicated regulations such as those established by the Election Rules. This often requires them to secure the assistance of external expertise to help them navigate the regulations so as to ensure compliance with the law. Unfortunately, the Election Rules’ emphasis on speed over substance leave little

time for companies like this to secure external expertise and establish a process that ensures compliance with the law. At the same time the Election Rules do not give employees a reasonable period of time to determine for themselves whether they wish to be represented by a labor organization in an appropriate unit. The exclusive representation model established by the National Labor Relations Act is a complicated system in which employees delegate almost all of their ability to represent themselves in their dealings with employers to a labor organization. As such, it is critical that those employees have time to fully understand that process and the implications of their choice. The Election Rules, unfortunately, take away that reasonable period of time, and leave employees with a scant few weeks to make this critical decision.

Assuming the NLRB does not undertake a wholesale rescission of the Election Rules, we suggest the NLRB consider making several key changes.

- First, we believe that the process for determining the appropriateness of a bargaining unit should be lengthened to a reasonable period of time so as to ensure accuracy in the bargaining unit determination.
- Second, we believe that the voter list requirement of the Election Rules should be rescinded, and that in the interests of employee privacy, employers should be limited in what they can share with labor organizations in a representation case. Specifically, the NLRB should limit the information an employer must provide to the names and home mailing addresses of employees in the bargaining unit such as that which was required under the *Excelsior Underwear* standard.

We offer the following detailed assessment in support of our position on the Election Rules:

1. The old election procedures were time-tested, and provided predictability and stability to the election process in a way the Election Rules do not.

For over 50 years the rules governing the processing of representation case petitions remained relatively stable and unchanged. They offered predictability and stability. Most elections were the result of a stipulated election agreement. Where legitimate issues were raised as to the appropriateness of the bargaining unit, they were usually handled at the pre-election stage. Most of the time unit issues were resolved informally and in a manner acceptable to all parties involved. This ability to settle unit issues and voter eligibility before an election offered certainty and stability for employees, employers and participating labor organizations.

While there are always anomalies, under the old rules most elections took place within a reasonable period of time. In reality, the old rules did not offer the opportunity for delay and obstructionism that their detractors claimed justified the faster time frame for elections. As a practical matter, under the old rules, elections generally took place within five (5) to six (6) weeks from the filing of the petition.¹ That timeframe was generally viewed as being reasonable. Yet, through the Election Rules, the NLRB sought to make the time between a petition's filing and the election

¹ While it may be true that there were some representation cases that took longer, those cases were rare, and never justified changing the rule to accommodate the exception.

even faster. That emphasis on speed had a negative impact on the ability of the NLRB to fulfill the principles of Section 7 of the NLRA.

Designating a labor organization as one's exclusive representative is a very important decision for all parties involved. If employees choose to form a labor organization, the employer must bargain with the union over all wages, hours and terms and conditions of employment. In other words, once employees choose to be represented by a labor organization, the labor organization assumes a comprehensive role in determining the basic aspects of the workplace for all employees in the bargaining unit. In recognition of that reality, Congress and the NLRB created the secret ballot election process to provide employees a reasonable opportunity and time to make such an important decision. During the time a representation petition is pending, the employees can hear the various positions on the subject, can weigh the various positions, and can make an informed decision that is best for them when they cast their ballot. The process made sense and functioned well.

Unfortunately, in an attempt to account for the rare exception where delays were unreasonable, the NLRB promulgated the Election Rules to accelerate the pace with which petitions were processed. Instead of promoting the ability of employees to make an informed decision, the pace and restrictions imposed by the Election Rules on the process have served to undermine it. While the Election Rules have reduced election time by about two weeks, they have done so at the expense of making fully informed appropriate unit determinations. The Election Rules have also limited the ability of employees to have a reasonable opportunity to weigh the pros and cons of representation by removing the additional time to contemplate their decision. The result has been a negative impact on employee free exercise of their Section 7 rights.

- 2. The parties to an election petition should have a reasonably sufficient period of time, but no less than 14 days, to identify relevant pre-election issues, reach a stipulated agreement on the appropriate unit, or conduct a hearing to resolve questions of representation.**

Scheduling the Hearing.

Section 9(b) of the NLRA requires the NLRB to “decide in each case . . . the appropriate unit for the purposes of collective bargaining” as to “assure employees the fullest freedom in exercising the rights guaranteed by” Section 7 of the NLRA. Under the old election rules, the NLRB achieved this by affording parties the opportunity to raise and effectively address appropriate unit and voter eligibility issues at an evidentiary hearing. The hearing was typically scheduled 7-14 days after the petition was filed. This timeframe gave parties a reasonable period of time to investigate the petition, attempt to reach a stipulated election agreement and prepare for the hearing if an agreement could not be reached. Moreover, the NLRB had the discretion to extend hearing dates when the situation warranted doing so. This process ensured the parties had sufficient time to agree on the appropriate unit or provide the NLRB with the salient facts and arguments at an evidentiary hearing so that it could produce accurate and predictable results based in fact and law.

The Election Rules changed all this. Rather than accounting for the variations that exist in the diverse workplaces under the NLRB's jurisdiction, the new rules imposed rigid and inflexible deadlines that have served to prevent the parties and the NLRB from sufficiently addressing appropriate unit issues before an election is directed. NLRB Rule § 102.63(a)(1) now requires the pre-election hearing to be scheduled "for a date 8 days from the date of service of the notice." The Board gave regional directors the discretion to postpone the hearing for up to only 2 business days. NLRB Rules §102.63(a)(1). It is not uncommon for key witnesses to be unavailable, or for employers not to have received the petition on the date it was filed.² However, our research reveals that as a practical matter such requests are rarely sought or granted in light of the high bar created by the "special circumstances" requirement to permit an extension of time. Moreover, two extra business days do not typically offer sufficient time for the parties to identify the issues, reach agreement, or prepare for a hearing. Such a limitation on flexibility for scheduling a critical evidentiary hearing is unreasonable and should be removed.

Considering the importance of making appropriate unit determinations and the controlling weight the NLRB Rules has placed on the filing of the Statement of Position, we advocate that the NLRB not impose artificial time restraints that result in salient facts and arguments being excluded from consideration in a Section 9(c) hearing. We believe the NLRB's decision to impose a "one-size-fits-all" time requirement for employers regardless of the size of the workforce involved or the nature of the operations has done a disservice to the election process and to the core principles of the NLRA.

The NLRB Rules should be amended to give meaningful consideration to the everyday realities of each petition and, at a minimum, allow 14 days for employers to prepare the Statement of Position and attempt to reach a stipulated agreement. The NLRB should return to a process in which there is sufficient discretion to adjust the hearing date on a case-by-case basis to reflect considerations such as the number of employees involved and the complexity of the petitioned-for unit. By way of example, this would offer the NLRB the opportunity to account for the fundamental differences between a single location bargaining unit of 10 employees and a multi-location bargaining unit of 2,000. The two scenarios present very different situations with different levels of complexity, and which require different allocations of resources.

The Statement of Position.

Worse than the rigid scheduling requirements for the hearing, is the requirement that the employer file a Statement of Position under NLRB Rule § 102.63(b)(1) before going to hearing. The requirement for a Statement of Position is a problem for two fundamental reasons.

² It is also not uncommon for petitions to be filed late in the day on a Friday, only to have it sit on a company fax machine or in a supervisor's email in box for the entire weekend before it is discovered when people return to work on Monday.

First, the deadline for filing the Statement of Position is unreasonable. It must be filed by noon on the day before the date of the originally scheduled hearing. However, if the date of the original hearing is in fact moved, the deadline for the filing of the Statement of Position is not automatically moved because it is not tied to the actual date of the hearing. We have learned that in some cases, where a hearing date has been postponed, the NLRB has insisted that the Position Statement be filed on the date and time originally set forth in the papers accompanying the Petition. Obviously, if a hearing date is to be postponed for legitimate reasons, then so too should the deadline for filing the Position Statement since that document contains all of the substantive legal positions of the employer.

Second, the existence of the Position Statement requirement undermines the process as well. The Statement of Position is a comprehensive document that requires employers to address a list of legal questions, including whether the petitioned-for unit is appropriate, the classification of employees required to be included/excluded from the unit, a complete and accurate list (including names, work locations, shifts, and job classifications) of all individuals in the petitioned-for unit; the existence of any election bars that would legally preclude an election from being held; the proposed date/time/location to hold the election; and the name and contact information of the individual serving as the employer's representative. *See*, NLRB Statement of Position Form 505 and NLRB Rule §102.63(b)(1)(i)-(iii). Preparing and filing the Statement of Position involves identifying, locating and analyzing a significant amount of employee data and records (such as names, classifications, work schedules, management structures, work rules and policies, job duties, wage and benefit information, and supervisory structure), and interviewing supervisors and managers, often with the assistance of legal counsel. Per NLRB Rule § 102.66(d), failing to raise facts or arguments in the Statement of Position means they are waived.

Despite the importance the NLRB places on the Statement of Position in the representation election process, the Election Rules force employers to rush through the process of preparing it at the expense of accuracy. In fact, our research revealed that in some situations the haste in which the Statement of Position must be prepared contributed to erroneous completion and waiver of otherwise meritorious arguments, or overinclusion of issues so as to avoid waiver of any of them. Such submissions do no one any good, least of all the employees who are entitled to have the NLRB determine the appropriateness of the bargaining unit to which they belong. This is harmful to free exercise of Section 7 rights because employees can be wrongly excluded from the voting unit and the election results reflect that of a fractured unit and not necessarily the true majority of employees in the unit.³

It should also be noted that under the Election Rules, the burden of preparing and producing an accurate Statement of Position lies exclusively with the Employer. This inappropriately places the burden on the Employer. If any party should submit a Statement of Position, it should be the

³ In *PCC Structural*s, 365 NLRB No. 160 (2017), the Board recently returned to the traditional community-of-interest standard for determining whether the petitioned-for unit is appropriate. Granting employers just 7 days to file Statements of Positions related to appropriate units, under the cloud of a "raise it or waive it" requirement, also restricts the exercise of Section 7 rights, which is the very result the *PCC Structural*s Board intended to resolve.

petitioning labor organization. It is the petitioning labor organization that commenced the process by filing the petition, and so too should the petitioning labor organization bear the initial burden to show that the bargaining unit it seeks is appropriate. Oddly, in fashioning the Election Rules, the NLRB seemed to overlook this basic issue. If the NLRB is to keep the requirement for a Statement of Position, that requirement should be applied to the petitioning labor organization and not the Employer.

3. The expanded voter list in NLRB Rules §102.62(d) and §102.66(k)(1) should be rescinded because it imposes impracticable requirements and compels disclosure of highly personal and private employee information to labor unions even over employee objections.

Under the old NLRB election rules, employers were required to submit an *Excelsior* list to the NLRB that included the names and home addresses of the employees eligible to vote in the election. The *Excelsior* list had to be submitted within seven days of the approval of the stipulated election agreement or the issuance of the Decision and Direction of Election. Upon submission, the NLRB was responsible for making the *Excelsior* list available to the parties to the petition. For decades, this process effectively served the purpose of the NLRA by sharing a reasonable amount of information about the employees in the bargaining unit.

Without the benefit of any well-reasoned justification, the Election Rules replaced the *Excelsior* list with a substantially more expansive disclosure requirement in the Voter List which includes “a list of full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (“cell”) telephone numbers).”

We have a fundamental objection to this expansive Voter List. First, despite significantly expanding the disclosure requirements, the Election Rules dramatically shortened the time period for filing the voter list from seven days to two days after approval of the election agreement or issuance of a decision and direction of election. Employers are frequently challenged to provide a complete and accurate list, especially considering that to date the NLRB has not provided any meaningful guidance concerning what it means for contact information to be “available.” Employers are realizing that such information may be stored in many different locations including on supervisors’ cellphones, chat groups, private email, etc. that are not contained in the employer’s official files. This is a problem because despite the vagueness of the requirement, the NLRB has taken the position that failing to produce an accurate list regardless of reason constitutes objectionable conduct sufficient to set aside an election.

Our research also revealed that the single biggest complaint arising out of representation cases under the Election Rules is that the participating labor organization was given access by the employer to employee contact information that employees considered private. Employees have been upset and resentful that their private information, such as cellphone numbers and email addresses, are disclosed to labor unions without their authorization. Such resentment is

understandable considering how labor organizations have utilized technology to contact employees using that personal information. For example, our research found examples where labor organizations used the personal contact information provided in the Voter List to send hundreds or even thousands of unsolicited text messages, calls and emails to employees' cellphones. Further, once private information is disclosed through the Voter List, it is forever in the possession of the labor organization. The only way for an employee to get away from unsolicited communications is to change the contact information or disable the cellphone when not in use; neither option is particularly palatable.

Moreover, much of the information the Election Rules require be disclosed is information that privacy experts strongly recommend be safeguarded from disclosure. For instance, privacy experts have warned that hackers and identity thieves are frequently using email addresses and cellphone numbers to steal identities and/or spread malicious code. So while individuals acting on such advice are going to great lengths to safeguard such information, the NLRB has disregarded these legitimate concerns by broadening its disclosure requirement.

The NLRB's approach makes no sense at all, especially considering that labor unions already had a reliable way of getting in touch with employees under the *Excelsior* rule - their home addresses. It would seem that limiting production of contact information to names and home addresses would offer a reasonable balance to resolve this problem. Moreover, the fact that the NLRB was responsible for sharing the *Excelsior* list with the parties, rather than the employer, which is required under the Election Rules, places an appropriate government imprimatur on the disclosure.

What makes even less sense is the NLRB's refusal meaningfully consider an opt out mechanism for employees to prevent having their private information disclosed. While the NLRB has taken the position that unsolicited contacts are an important component of the election process, it is irresponsible for the NLRB to sanction unsolicited contacts by mail, text, phone calls, email, etc., with minimal regulation and without giving employees any mechanism to stop it. Employees have been understandably upset at this, as would most individuals forced to endure persistent and unsolicited contacts on their personal cellphone and email.

For these reasons, we advocate for, at a minimum, rescinding the new expanded Voter List disclosure requirement, returning to the pre-existing *Excelsior* list requirements, and giving employees a meaningful mechanism for opting out of unsolicited contacts by labor unions during organizing campaigns.

Conclusion

We ask the NLRB to consider the foregoing in its assessment of the Election Rules. Congress intended for employees to freely decide whether they wanted to form, join, or support a labor organization, it did not intend the Section 9(b) process to be slanted so far in favor of unions at the expense of Section 7 rights. The Election Rules have done a disservice to the NLRA and the

Section 7 rights of employees. The Election Rules should be rescinded or substantially modified in accordance with the above comments.

Thank you for this opportunity to comment and we look forward to continuing to work closely with FDA on these matters. Please do not hesitate to contact us if we can provide additional information.

Respectfully submitted,

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